



**Billing Code [4810-25-P]**

## **FINANCIAL STABILITY OVERSIGHT COUNCIL**

### **Hearing Procedures**

**AGENCY:** Financial Stability Oversight Council.

**ACTION:** Notice of availability; response to comments.

**SUMMARY:** The Financial Stability Oversight Council (Council) has adopted amendments to its hearing procedures (Council Hearing Procedures) for hearings conducted by the Council under Title I and Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The Council initially approved hearing procedures on May 22, 2012 (Initial Hearing Procedures), and has adopted amendments to apply the procedures to financial institutions engaged in payment, clearing, or settlement activities that are the subject of a proposed designation by the Council under Title VIII of the Dodd-Frank Act.

**EFFECTIVE DATE:** April 4, 2013.

**FOR FURTHER INFORMATION CONTACT:** Amias Gerety, Deputy Assistant Secretary for the Financial Stability Oversight Council, at (202) 622-8716; or Thomas E. Scanlon, Senior Counsel, Department of the Treasury, at (202) 622-8170.

### **SUPPLEMENTARY INFORMATION:**

#### **I. Background**

On May 22, 2012, the Council approved the Initial Hearing Procedures under sections 111, 113, 804, and 810 of the Dodd-Frank Act.<sup>1</sup> The Initial Hearing Procedures related to the conduct of hearings before the Council in connection with proposed determinations and emergency waivers or modifications made pursuant to Title I and Title VIII of the Dodd-Frank Act. The Council posted the Initial Hearing Procedures on its website, <http://www.fsoc.gov>, and

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<sup>1</sup> 12 U.S.C. 5321, 5323, 5463, and 5469.

on <http://www.regulations.gov>, and issued a notice of availability and request for comment on the procedures.<sup>2</sup> Four comments were submitted.<sup>3</sup>

In general, when the Council makes a proposed determination regarding a nonbank financial company under section 113 of the Dodd-Frank Act or a proposed designation of a financial market utility (FMU) or a payment, clearing, or settlement activity under section 804 of the Dodd-Frank Act, the Council must give the nonbank financial company, FMU, or financial institution engaged in the payment, clearing, or settlement activity notice and an opportunity to contest the proposed determination or designation through a hearing.<sup>4</sup> The Dodd-Frank Act does not set forth procedures for a hearing to contest the proposed determinations or designations. The Council has adopted the Council Hearing Procedures in order to provide procedures for a nonbank financial company, FMU, or financial institution engaged in a payment, clearing, or settlement activity that requests a hearing.

Except for limited amendments, particularly to expand the scope of “petitioner” to include a financial institution engaged in payment, clearing, or settlement activities, as discussed below, the Council is not modifying the Initial Hearing Procedures. The Council is issuing this notice to respond to the comments received and to provide guidance on the implementation of the Council Hearing Procedures. In addition, the Council has posted the Council Hearing Procedures on its website, <http://www.fsoc.gov>, and on <http://www.regulations.gov>.

## **II. Amendment to the Initial Hearing Procedures**

The Council has expanded the scope of the hearing procedures by amending the definition of “petitioner” in § 2 of the Initial Hearing Procedures. The Council is adding a new

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<sup>2</sup> Hearing Procedures; Notice of Availability, 77 FR 31,855 (May 30, 2012).

<sup>3</sup> Comments were received from American Financial Services Association (AFSA), American Insurance Association (AIA), Gibson, Dunn & Crutcher LLP (Gibson, Dunn), and The Financial Services Roundtable (the Roundtable).

<sup>4</sup> 12 U.S.C. 5323(e)(1)-(2), 5463(c)(2).

paragraph (5) to the definition of “petitioner” to include “[a] financial institution which engages in a payment, clearing, or settlement activity that is the subject of a proposed designation, pursuant to section 804 of the Dodd-Frank Act, and which seeks to demonstrate that the proposed designation or rescission of designation is not supported by substantial evidence.”

Correspondingly, the Council is amending the definition of “hearing” to cover a proceeding involving a financial institution which engages in a payment, clearing, or settlement activity.

Under section 804(a)(1) of the Dodd-Frank Act, the Council is authorized to designate “payment, clearing, or settlement activities that the Council determines are, or are likely to become, systemically important.”<sup>5</sup> Section 804(c) of the Dodd-Frank Act permits a financial institution engaged in payment, clearing, or settlement activities to request a hearing before the Council to demonstrate that the proposed designation (or rescission of designation) of such activities is not supported by substantial evidence.<sup>6</sup> The amendments to the Initial Hearing Procedures clarify that if the Council issues a notice of a proposed designation relating to a payment, clearing, or settlement activity, one or more financial institutions that engage in that activity may request a hearing to contest the Council’s action.

In addition, the Council has amended § 5(e) of the Initial Hearing Procedures to provide that petitioners will be entitled, upon request, to obtain a copy of the transcript or other recording of an oral hearing without payment of the cost of the transcript or recording.

### **III. Guidance on Council Hearing Procedures**

#### **A. Oral Hearings**

In the context of proposed determinations regarding nonbank financial companies, all four commenters request that the Council amend the procedures to allow for an oral hearing for

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<sup>5</sup> 12 U.S.C. 5463(a)(1).

<sup>6</sup> 12 U.S.C. 5463(c)(2)(C).

any petitioner that requests one. For example, one commenter states that “the Council should exercise its statutory discretion to grant oral hearings to any nonbank financial company that requests one.”<sup>7</sup> The commenter envisions that an oral hearing would “provide an effective interactive opportunity for the company to discuss and as necessary challenge the assumptions, views and preliminary conclusions of the Council or its representatives.”<sup>8</sup>

The Council considered these comments and has determined that an amendment that would grant a petitioner, as a matter of right, an oral hearing to contest a proposed determination is neither necessary nor appropriate. As the commenters note, sections 113 and 804 of the Dodd-Frank Act provide the Council sole discretion to determine whether to afford a petitioner an oral hearing, and the Council Hearing Procedures are consistent with the statute.<sup>9</sup> However, the Council believes that, depending on the particular facts and circumstances, and as may be supported by the petitioner in its request for an oral hearing,<sup>10</sup> the Council may exercise its sole discretion to grant requests for oral hearings. For example, the Council agrees with commenters that an oral hearing could provide a valuable opportunity for the Council or its representatives to pose questions to a petitioner regarding a proposed determination. Thus, for an FMU or nonbank financial company, the Council anticipates that, in exercising its sole discretion to grant an oral hearing, the Council generally will grant a timely request for an oral hearing.

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<sup>7</sup> Roundtable, at 4. Similarly, AFSA “strongly urges” the Council to provide an oral hearing to “each petitioner that chooses to contest a proposed determination.” AFSA, at 4.

<sup>8</sup> Roundtable, at 4. See also AIA, at 4 (“a company should have an opportunity to examine Council staff that performed the analysis that is the basis for the Council’s proposed action, as well as the opportunity to present its own witnesses”). Likewise, another commenter describes an oral hearing as permitting a nonbank financial company to “communicate interactively with Council members,” allowing a “dynamic exchange of information” between the petitioner and the Council. Gibson, Dunn, at 5.

<sup>9</sup> A commenter suggests that a request for an oral hearing should not be “unreasonably denied,” AIA, at 4, and another commenter goes further by suggesting that the Council “should use its discretion in a broad manner to provide for oral evidentiary hearings, unless [the Council] can demonstrate that such hearings are inappropriate or unnecessary.” AFSA, at 3-4. As noted above, sections 113 and 804 of the Dodd-Frank Act provide the Council “sole discretion” to grant an oral hearing, and the Council Hearing Procedures reflect this statutory standard. Nothing in section 113 or section 804 of the Dodd-Frank Act suggests that the Council bears the burden of showing that an oral hearing is inappropriate or unnecessary in order to deny a request for an oral hearing.

<sup>10</sup> Council Hearing Procedures, § 3(b).

The Council notes that it anticipates that any oral hearing that is granted will consist only of oral testimony or oral argument by the petitioner.<sup>11</sup> No provision of section 113 or section 804 of the Dodd-Frank Act, nor any provision of the Council Hearing Procedures, contemplates that the petitioner may pose questions to Council members or to staff of the Council who have contributed to the work of the proposed determination.<sup>12</sup>

#### B. Notice to Affiliates and Participation by a Subsidiary

One commenter contends that the Council should provide written notice of a proposed determination to not only the nonbank financial company but also the nonbank financial company's affected subsidiaries.<sup>13</sup> The Council considered this comment and determined that the Initial Hearing Procedures need not be amended in this manner. First, the Council's provision of written notification of a proposed determination falls outside the scope of the Council Hearing Procedures. Second, the Dodd-Frank Act and the Council's regulations require the Council to provide written notification only to the nonbank financial company that is the subject of the proposed determination.<sup>14</sup> Third, as the commenter suggests,<sup>15</sup> the nonbank financial company itself can notify its subsidiaries of the Council's proposed determination.

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<sup>11</sup> Council Hearing Procedures, § 2.

<sup>12</sup> One commenter recommends that companies receiving a notice of proposed determination should be allowed to ask the Council clarifying questions and the Council should provide necessary responses before a company would have to submit a petition for a hearing under the Council Hearing Procedures. AFSA, at 2. Similarly, a commenter requests that the Council should provide the nonbank financial company the opportunity to obtain copies of the materials upon which the Council's proposed determination is based and to examine Council staff that performed the analysis that forms the basis of the Council's proposed determination. AIA, at 4. The Council has determined not to modify the Initial Hearing Procedures in response to these comments because the notice of proposed determination will include an explanation of the basis of the proposed determination. 12 U.S.C. 5323(e)(1) and 12 C.F.R. 1310.21(b). However, the Council anticipates that relevant staff would be available to answer ministerial or technical questions that a petitioner may have regarding the process for requesting a hearing under the Council Hearing Procedures.

<sup>13</sup> Gibson, Dunn, at 3-4.

<sup>14</sup> 12 U.S.C. 5323(e)(1); 12 C.F.R. 1310.21(b). See also Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 FR 21,637, 21,662 (April 11, 2012) ("Before a vote of the Council with respect to a particular nonbank financial company, the Council members will review information relevant to the consideration of the nonbank financial company for a Proposed Determination. . . . [T]he Council intends to issue a written notice of the Proposed Determination to the nonbank financial company, which will include an explanation of the basis of the Proposed Determination.") (emphasis added).

This commenter also asks the Council to clarify that subsidiaries of a nonbank financial company being considered under any proposed determination have full participatory rights in written and oral hearings.<sup>16</sup> The Council finds that section 113 of the Dodd-Frank Act and the Council’s rule and interpretive guidance regarding nonbank financial company determinations<sup>17</sup> do not provide a basis to grant to a subsidiary of a nonbank financial company that is the subject of a proposed determination “full participatory rights” in the Council’s proceedings.

Nonetheless, the Council notes that the Council Hearing Procedures (unchanged from the Initial Hearing Procedures) provide that a petitioner may submit relevant exhibits in support of its written statement, which may include declarations or affidavits from a subsidiary.<sup>18</sup> In addition, § 5(d)(2) of the Council Hearing Procedures (unchanged from the Initial Hearing Procedures) provides that “[o]ne or more individual officers, employees, or other representatives (including counsel) of the petitioner may appear for the petitioner to present oral testimony, oral argument, or both.” The Council believes that a representative from one of the petitioner’s subsidiaries may qualify as a “representative” of the petitioner to appear in an oral hearing, as the petitioner may determine. Thus, the Council believes that the Initial Hearing Procedures need not be amended, because they provide a means for a subsidiary to participate to the extent that a petitioner believes such participation to be appropriate.

#### C. Designation of the Hearing Clerk and Submission of Materials

One commenter requests that the Council clarify how the appointment of a Hearing Clerk would occur and who may be appointed to that position. In particular, the commenter asks that a

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<sup>15</sup> Gibson, Dunn, at 3.

<sup>16</sup> Gibson, Dunn, at 5.

<sup>17</sup> Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 FR 21,637 (April 11, 2012).

<sup>18</sup> Council Hearing Procedures, § 4(b).

Hearing Clerk be a member of “senior level staff at the Council.”<sup>19</sup> Section 2 of the Council Hearing Procedures defines the Hearing Clerk as “an individual appointed by the Chairperson [of the Council] to facilitate a written or oral hearing before the Council or its representatives.” The Chairperson must appoint the Hearing Clerk “[u]pon receipt of a timely written request for a hearing . . . .”<sup>20</sup> Even though the Council has delegated authority to the Chairperson to select the Hearing Clerk, the Council expects the Chairperson to exercise that authority by selecting an individual who is a senior member of the staff of the Council or of a Council member or member agency.

One commenter requests that the number of days afforded to a nonbank financial company petitioner to submit written materials after an oral hearing be extended from seven to fifteen days.<sup>21</sup> The Council believes that the Initial Hearing Procedures need not be amended in this manner because seven days is a reasonable period in light of the fact that, at the time at which this section would be relevant, a nonbank financial company petitioner already will have had an opportunity to submit written materials, and an oral hearing, to contest the Council’s proposed determination.

This commenter also states that any limitations on the written materials a petitioner may present, or on the duration of an oral hearing, as permitted under § 3(c) of the Council Hearing Procedures (unchanged from the Initial Hearing Procedures), should be applied by the Hearing Clerk in “extreme cases only.”<sup>22</sup> More generally, this commenter requests that, before the Council or the Hearing Clerk selects a date and place the petitioner is required to appear for a

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<sup>19</sup> AFSA, at 3.

<sup>20</sup> Council Hearing Procedures, § 3(c).

<sup>21</sup> AFSA, at 4. See Council Hearing Procedures, § 5(b)(3)(ii).

<sup>22</sup> AFSA, at 3. See also AIA, at 5 (stating that “due process considerations and fundamental fairness suggest that no limit should be imposed on the ability of a [nonbank financial] company, which is on the brink of being determined by the Council to be subject to Federal Reserve Board supervision, to submit what [the company] concludes is necessary to convince the Council otherwise”).

hearing, “the Hearing Clerk communicate with the petitioner to pick a date, time, and place which is convenient for both the petitioner, the Hearing Clerk, and [the Council].”<sup>23</sup> The Council has determined that the Initial Hearing Procedures need not be amended to address these concerns regarding the particular limitations or arrangements that generally should apply in hearings. Nonetheless, the Council expects that, in the ordinary course of making procedural determinations, the Hearing Clerk will coordinate with the petitioner, as appropriate, for the purpose of facilitating an “orderly and timely” hearing.<sup>24</sup>

#### D. Denial and Dismissal of a Hearing

Section 7 of the Council Hearing Procedures provides that “[f]ailure to make a timely request for a hearing will waive the petitioner’s right to a hearing pursuant to section 113(e)(4) or section 804(d)(2) of the Dodd-Frank Act.” One commenter requests that the Council clarify that the Council or the Hearing Clerk will verify that the petitioner did, in fact, receive the Council’s notice of the proposed determination before a petitioner is deemed to have waived a right for a hearing.<sup>25</sup> The Council expects to take reasonable steps to verify that a petitioner has, in fact, received the Council’s notice of proposed determination before determining that a waiver has occurred under § 7 of the Council Hearing Procedures.

Dated: April 4, 2013

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Rebecca H. Ewing  
Executive Secretary, Department of the Treasury

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<sup>23</sup> AFSA, at 4.

<sup>24</sup> Council Hearing Procedures, § 3(c).

<sup>25</sup> AFSA, at 5.



